No. 12137

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADRIANO LLANOS SENARILLOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

The offense in this case was charged in the indictment pursuant to the provisions of Title 8, Section 152 of the United States Code [T. 2]. Said indictment was filed on October 6, 1948 [T. 3]. The District Court had jurisdiction of the cause under Title 18, Section 3231, effective September 1, 1948, which confers on the District Courts original jurisdiction of "all offenses against the laws of the United States."

The offense charged was committed in the County of Los Angeles, State of California [T. 2]. On the 25th day of October, 1948, the appellant appeared before the District Court for the Central Division of the Southern District of California for arraignment and plea [T. 3], and entered a plea of not guilty [T. 4]. Thereafter on No-

vember 26, 1949, the cause was tried by the Court [T. 5, 6] pursuant to a waiver of jury signed by appellant on said date and filed on November 28, 1948 [T. 4, 5]. The appellant was found guilty of the offense alleged in the indictment and on December 20, 1948, was sentenced [T. 7, 8]. A Notice of Appeal was filed on December 20, 1948 [T. 8, 9], and the appeal perfected thereafter [T. 9, 10, 11, 12, 13].

This Court has jurisdiction under the provisions of Title 28, Section 1291 of the United States Code.

Statement of Facts.

Previous to April 20, 1948, the appellant filed with the Immigration and Naturalization Service [T. 33] Service Form I-256, entitled, Submission to Deportation Process and Application for Suspension of Deportation, and Form I-55, entitled, General Information Form [T. 15, 34, 35]. Therefore, pursuant to the provisions of 8 C. F. R. 150.10, a warrant of arrest was issued for the appellant by United States Immigrant Inspector Lewis A. Denny [T. 15, 33]. On April 20, 1948, a hearing was held to determine whether the Attorney General would exercise his discretion to suspend deportation of the appellant [T. 15, 33]. Presiding Inspector Denny administered the oath to the appellant [T. 16, 34]. Subsequently, during the course of that hearing, the appellant testified that he had never lived in the United States before May of 1945, that he had never been arrested and deported out of the United States and that he had never been arrested and convicted of any crimes either here or in the Philippine Islands, or elsewhere [T. 46]. However, shortly after he so testified, he was asked to examine a certain Federal Bureau of Investigation record, Form T-2, which related to one Eddie

Sinarillos, also known as Adrian Llanos, Adrian S. Llanos, Adie Llanos Sikirillos and other names [T. 47], and other documents which indicated that he had been convicted in Los Angeles, California and Portland, Oregon of the crime of burglary. It was further revealed that in 1937 he had been imprisoned in San Quentin on a sentence of five years to life [T. 47, 48, 49, 50, 51]. When he examined these papers he admitted that they related to him and the facts contained therein were his record [T. 27, 29, 47].

When the above mentioned warrant of arrest had been served on the appellant by Inspector Denny, he was fingerprinted, and these fingerprints were submitted to the Federal Bureau of Investigation. In response, the said Form T-2 came back showing his record of arrests [T. 21]. Thus the appellant, through the fingerprints, was definitely proved to be the same person as described in the Federal Bureau of Investigation file.

The appellant further admitted in that hearing that after he was released from San Quentin he was paroled to the Immigration Service for deportation. Thereafter, he was deported on or about February 7, 1940, pursuant to a Warrant of Deportation issued on the 29th day of August, 1938. This admission came after he inspected said Warrant of Deportation and Form 535, entitled, Description of Person Deported, handed to him by Inspector Denny [T. 51, 52, 53]. It also developed during the trial of this case that before the hearing of April 20, 1948 took place, he had been examined in Manila by the American Army Consul in May, 1945, by the immigration officials upon his arrival in Hawaii, and again by the immigration officials in San Francisco and on those three occasions he made the same false statements upon which this indictment is predicated [T. 28, 29].

Question Involved.

Whether or not correction of false testimony in the same hearing in which it was uttered will expunge the witness of perjury.

Argument.

The only question involved in this appeal is whether or not correction of false testimony in the same hearing in which it was uttered will expunge the witness of perjury. The recognized leading case on this subject is *U. S. v. Norris*, 300 U. S. 564. In that case the defendant testified falsely before a Senate Sub-Committee. After the conclusion of his testimony, the Sub-Committee adjourned until the following day when several other witnesses were examined. The defendant was present and after hearing one of the witnesses testify he asked and was granted permission to return to the stand. He then told the truth about the matter under investigation. Thereafter, he was indicted for perjury under Section 125 of the Criminal Code and convicted by the District Court. The Court of Appeals reversed the conviction and the case went up to the Supreme Court on certiorari. In reversing the decision of the Court of Appeals, the Supreme Court stated:

> "We come to the substantial question which moved us to grant the writ of certiorari. * * * The respondent admitted he gave intentionally false testimony on September 22d. His recantation on the following day cannot alter this fact. He would have us hold that so long as the cause or proceeding in which false testimony is given is not closed, there remains a *locus poenitentiae* of which he was entitled to and did avail himself. The implications and results of such a doctrine prove its unsoundness. Perjury is an obstruction of justice; its perpetration well may af-

fect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury, and the crime is complete when a witness's statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role of witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means."

The court then went on to discuss the authorities which the respondent set forth to support his position. Among the cases which the court refused to follow was *People v. Gillette,* 126 App. Div. 665, 111 N. Y. Supp. 333, which the appellant in this case has cited in his opening brief. The court concluded as follows:

"The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely. We have here no such case."

A careful scrutiny of the law reviews reveals that the unanimous opinion among the writers dealing with the subject is that the decision of the *Norris* case covers the situation where false testimony is immediately retracted.

In 23 *Va. Law Review,* page 947, this opinion was expressed as follows:

> "The court in the instant case refused to extend the rule that immediate correction of false testimony will condone the crime. The result seems to be a sound application of the plain words of the statute and of public policy which demands that the crime of perjury be complete on giving of the false testimony and nothing thereafter can alter the situation."

In 51 *Harvard Law Review,* 155-156, the writer stated that the decisions in certain cases including *People v. Gillette, supra,* and *Brannen v. State,* 94 Fla. 656, 114 So. 429, were grounded on the assumption that a witness will thereby be more often induced to correct false testimony.

> "Since, however, the perjuror will not usually retract unless his false testimony has been first demonstrated, retractions thus induced will be of little value in furthering the administration of justice. * * *
>
> "Certain courts * * * have argued that the truth will be more often produced and the dignity of the court better protected by denying the escape of recantation to any perjuror who has deliberately misled the court. *Loubriel v. U. S.,* 9 F. 2d 807, and *Martin v. Miller,* 4 Mo. 47 (1835). Although the facts of the Norris case can be distinguished from the Gillette case, *the opinion of the Norris case is sufficiently broad to deny effect to any recantation.* In adopting this view, the court has followed the general

principle that prosecution for a crime may not be averted by subsequent reparation. *Savitt v. U. S.*, 59 F. 2d 541, C. C. A. 3rd (1932)." (Italics supplied.)

In 17 *Nebraska Law Bulletin*, 224 and 225, we again find the conclusion announced in the two previous articles concerning the decision of the *Norris* case:

> "The conviction, however, is entirely in keeping with the established and traditional stand taken upon any criminal act, namely, that once the deed is done the offense is complete and retraction and restitution will neither nullify the act or excuse the actor. *Savitt v. United States*, 59 Fed. 2d 541. Perjury is no different from any other crime in this respect. The crime is complete once the witness perjured himself and retraction even during the same trial will not obviate the charge. *Martin v. Miller* (1935), 4 Mo. 47, 28 Am. Dec. 342; *Seymour v. United States*, C. C. A. 8th (1935), 77 F. 2d 577."

See also, 76 *University of Pennsylvania Law Review* 751, for a criticism of *Brannen v. State, supra,* and the rule that the crime of perjury is condoned if correction is made immediately and as a part of the same examination.

In the recent case of *Meyers v. United States,* 171 F. 2d 800, 805 (1948), (writ of cert. den. Feb. 14, 1949), the Court of Appeals for the District of Columbia stated simply:

> "The crime of perjury is not removed, the Supreme Court has said, by the fact that the perjurer later in the proceedings tells the truth; that is to say, retraction following perjury does not destroy its criminality. *United States v. Norris* * * *."

In his opening brief at page 21, the appellant states that the case *In re Schnable*, 61 Fed. Supp. 386 (1945), is not in point. However, at page 395 the court in that case adopted the findings of fact, conclusions of law, and memorandum of a referee in bankruptcy which considered the subject of recantation and held as follows:

> "The filing of the amendment in this case does not expunge the original offense.
>
> "In *United States v. Norris,* * * * the court held that a witness who commits perjury cannot purge himself of the offense by subsequently recanting and that the crime of perjury is complete when a false statement has once been made.
>
> "In *United States v. Margolis,* 3 Cir., 138 F. 2d 1002, the court held that if the bankrupt's original answer at a hearing before a referee in a bankrutpcy proceeding was knowingly false, the crime of making a false oath in a bankruptcy proceeding was complete and it could not be expunged by a subsequent recanting."

In this case, the false statements were not made unintentionally or mistakenly but were deliberately and wilfully uttered [T. 27, 29, 30]. In fact, the appellant also admitted making the same false statements at an earlier time to the American Army Consul in Manila, to immigration officials upon his arrival in Hawaii and again when he was examined in San Francisco [T. 28, 29]. He did not correct his story in Manila, Hawaii, or in San Francisco and the only reason he admitted the truth before Inspector Denny was because he was confronted with documents which proved the falsity of his testimony [T. 23, 24, 47, 48, 49, 50, 51, 52].

In *People v. Gillette, supra,* the court advanced the unsound doctrine that the inducement to tell the truth would be destroyed if the witness could not correct a false statement in the same hearing except by running the risk of being indicted for perjury. But that holding is not an inducement to tell the truth; on the contrary, it is an inducement *not* to tell the truth. As pointed out in 51 *Harvard Law Review* 165-166, *supra,* a perjurer will not usually retract unless his false testimony has been demonstrated, as is the situation in *United States v. Norris, supra,* and in this case. What merit does such a retraction have, when the witness is confronted with the evidence which completely refutes his testimony. There is nothing else the witness can do but recant. The above mentioned article further calls our attention to the practical aspects of the rule in the *Norris* case:

> "The harshness of this rule to one who recants voluntarily and before his lie is revealed will be mitigated in practice by the discretion of prosecutors and judges and well known reluctance of juries to convict of perjury unless a culpability is clear."

At present in our courts of law, it appears that perjury is so common that it is almost taken for granted. It has brought some courts into such disrepute that many people have lost faith in them. Instead of winking solicitously at a practice which strikes at the very foundations of our democratic judicial system, it is time that we take to task those who consider the oath lightly. *We cannot afford to pamper the perjurer.* He must realize that it is his duty to tell the truth in the first instance when testifying under oath and that no subsequent retraction after being caught in his lie will cleanse him of the crime. We can offer no better inducement to tell the truth.

Conclusion.

It is respectfully submitted that the appeal is without merit and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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